STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION, SEIU LOCAL 1000, AFL-CIO,	)	
Charging Party,	)	Case No. SF-CE-105-S
v.	)	PERB Decision No. 1100-S
STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS),	)	May 4, 1995
Respondent.	)	

Appearances: California State Employees' Association by Melvin K. Dayley, Attorney, for California State Employees' Association, SEIU Local 1000, AFL-CIO; State of California (Department of Personnel Administration) by Paul M. Starkey, Attorney, for State of California (Department of Corrections).

Before Blair, Chair; Carlyle, Garcia and Caffrey, Members.

DECISION

BLAIR, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California State Employees' Association, SEIU Local 1000, AFL-CIO (CSEA) and the State of California (Department of Corrections) (Department or State) to a PERB administrative law judge's (ALJ) proposed decision. The ALJ dismissed CSEA's unfair practice charge in which it alleged that the State denied CSEA its protected organizational rights in violation of section 3519(b) of the Ralph C. Dills Act (Dills Act)[1] when it discriminated

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519 states, in pertinent part:

> It shall be unlawful for the state to do any of the following:

against a bargaining unit member for his participation in protected activity.

The Board has considered the entire record in this case, including the proposed decision, transcript, exhibits, the parties' statements of exceptions and oral argument presented by the parties.[2] Upon review of the record and applicable case law, the Board hereby reverses the ALJ's determination concerning deferral to arbitration and concludes that the matter must be dismissed and deferred to the parties' grievance and arbitration procedure.

FACTUAL SUMMARY

Andy Hsia-Coron (Hsia-Coron) is employed as a teacher at the Correctional Training Facility at Soledad. Hsia-Coron also served as a job steward for CSEA for seven years. In 1990, he

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(b) Deny to employee organizations rights guaranteed to them by this chapter.

[2]CSEA requested oral argument in this matter which was heard by the Board on August 18, 1993. Chair Blair joined the panel on December 16, 1993 and Member Garcia joined the panel on March 28, 1995. Both had the benefit of the entire record in this case, including the transcript of the oral argument proceedings.

The State filed a motion with the Board to strike CSEA's oral argument brief as untimely filed; or for leave to file a reply brief. Oral argument briefs were due to be filed with the Board on August 11, 1993. CSEA's brief was sent by certified mail, postmarked and filed on August 11, 1993. Under PERB Regulation 32135, CSEA's brief was timely filed. Therefore, the State's motion to strike CSEA's brief is denied.

The State's oral argument brief was also due to be filed with the Board on August 11, 1993. It was filed with the Board on August 16, 1993. As the State provided no good cause to excuse the late filing of its brief pursuant to PERB Regulation 32136, the State's oral argument brief was not considered by the Board and the State's motion to file a reply brief is denied.

was elected to the CSEA Bargaining Unit Council for Unit 3. In this role, beginning in May 1991, he served on the CSEA negotiating team during extended negotiations between the State and CSEA for a new Unit 3 contract.

On October 4, 1990, the Department issued a notice of adverse action to Hsia-Coron alleging absence without leave for the period of July 25-28, 1990, and failure to follow the direct order of his supervisor who ordered him to report for duty on those dates. CSEA challenged the disciplinary action asserting that Hsia-Coron had been on CSEA business during that time. A settlement was reached in which the Department's letter of reprimand would be removed from Hsia-Coron's personnel file effective July 1, 1991.

On June 6, 1991, Hsia-Coron received a performance evaluation for the period of April 1990 through April 1991. In all but one area Hsia-Coron was graded as meeting performance standards. One category was rated "improvement needed" based on the explanation that Hsia-Coron failed to attend a mandatory in-service training class on AIDS. Hsia-Coron and his supervisor, Howard Howser (Howser), discussed the evaluation and both signed the document.

The evaluation was subsequently reviewed and rejected by Jan Blake (Blake), the acting chief deputy warden for the facility. Blake met with Howser and directed him to revise the evaluation to reflect that Hsia-Coron had shown poor judgment in his absence from work during the period in July 1990. Although

Howser disagreed with including reference to the issue because the matter had been settled, on June 26, 1991 Howser revised the evaluation, rating Hsia-Coron as needing improvement in three additional categories.

After he changed the evaluation, Howser concluded that he should contact Hsia-Coron and inform him of the revisions to his evaluation. Howser knew Hsia-Coron was in Sacramento to participate in negotiations and he concluded that State negotiator Rich Hawkins (Hawkins) would know how to reach him. Howser called Hawkins' office and he was given a telephone number where he could reach Hawkins. When Howser called, the telephone rang in the conference room where negotiations were underway between CSEA and the State. Hawkins answered the telephone and called Hsia-Coron to the phone, advising him that his supervisor wanted to talk to him. Howser informed Hsia-Coron that he had been directed to change his evaluation and the new evaluation rated him as "improvement needed" in four areas rather than one. After hanging up the telephone receiver, Hsia-Coron blurted out to the members of the two negotiating teams that his supervisor has just told him that his evaluation had been changed. He quoted Howser as saying the change had been ordered by higher authorities. At that point, the CSEA negotiating team asked to take a caucus break and left the room.

CSEA's negotiating team discussed whether they should take

a position on the evaluation during the current negotiations, deciding ultimately that they should not. The caucus meeting lasted approximately one hour, after which negotiations resumed.

Several members of the CSEA negotiating team testified that the incident was disturbing. There is no evidence, however, that any CSEA negotiator quit the bargaining team, or that proposals or strategy were changed, or that negotiations were delayed or became more difficult because of the revised evaluation.

CSEA and the State were parties to a collective bargaining agreement (CBA), dated August 31, 1988 through June 30, 1991. Article 5, "General Provisions," section 5.5 states:

> The State and CSEA Local 1000 shall be prohibited from imposing or threatening to impose reprisals by discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining, or coercing employees because of the exercise of their rights under Ralph C. Dills Act or any right given by this contract. The principles of agency shall be liberally construed.

Article 2, "Union Representation Rights," section 2.8 states:

> The State shall be prohibited from imposing or threatening to impose reprisals, from discriminating or threatening to discriminate against Union stewards, or otherwise interfering with, restraining, or coercing Union stewards because of the exercise of any rights given by this contract.

Article 6, "Grievance and Arbitration Procedure," section 6.2 (amended by a side letter dated June 14, 1989) defines a grievance as a "dispute of one or more employees, or a dispute between the State and the Union, involving the interpretation, application, or enforcement of the express terms of this

Agreement." The CBA also provides for binding arbitration of grievances. (Art. 6, sec. 6.12(e).)

On December 26, 1991, CSEA filed an unfair practice charge alleging that the State violated section 3519(a), (b), (c) and (d) of the Dills Act by revising and downgrading the evaluation of one of its negotiators. On March 31, 1992, after receiving assurances that the State would process grievances filed prior to the expiration of the CBA, through arbitration if necessary, CSEA withdrew all allegations except the allegation that by issuing the revised evaluation to Hsia-Coron the State violated Dills Act section 3519(b).

The PERB general counsel issued a complaint on April 22, 1992, which alleged that the State denied CSEA its right to represent unit members in violation of section 3519(b) when on or about June 26, 1991, it issued a negative performance evaluation to Hsia-Coron. The same date, the general counsel denied the State's motion to dismiss the charge as untimely filed and the motion to defer the charge to arbitration.

The State answered the complaint on May 20, 1992, denying that it had interfered with CSEA's protected organizational rights. A hearing was conducted in San Francisco on July 9 and 10, 1992. At the commencement of the hearing, the State renewed its motion to defer the charge to arbitration. The motion was taken under submission by the ALJ.

ALJ'S PROPOSED DECISION

Applying current PERB precedent, the ALJ denied the State's motion to defer to arbitration after finding no provision in the parties' contract which prohibited the State from denying employee organizations their rights under the Dills Act.

On the merits of the case, the ALJ noted that in order to establish a violation of Dills Act section 3519(b), CSEA must first prove that the State discriminated against Hsia-Coron for participation in protected activity, just as it would "had the 3519(a) violation not been deferred to arbitration." CSEA must then prove that the discrimination resulted in actual harm to CSEA, denying it the right to represent its members.

The ALJ concluded that a prima facie case of discrimination against Hsia-Coron had been established. However, the ALJ determined that CSEA failed to prove that the State's retaliatory action against Hsia-Coron resulted in actual harm to CSEA, and thus denied CSEA the right to represent its members in violation of Dills Act section 3519(b).[3]

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[3]The Board, in State of California (Franchise Tax Board) (1992) PERB Decision No. 954-S, described the burden of proof which a union must carry if it is to show a violation of subsection (b) in cases where an (a) violation alleged on the same conduct has been deferred to arbitration. The Board stated:

> To establish a violation of 3519(b) under these circumstances, a charging party must show actual denial of the union's rights under the Dills Act. A showing of theoretical impact is insufficient.

THE STATE'S EXCEPTIONS

On appeal, the State reasserts its argument that this charge must be deferred to arbitration under the provisions of the parties' CBA. Alternatively, on the merits, the State argues that the ALJ erred when he determined that the evidence supported a prima facie case of discrimination against Hsia-Coron. The State contends that it did not depart from established procedures when it revised Hsia-Coron's evaluation.

CSEA'S EXCEPTIONS

CSEA proposes that PERB modify its standard for establishing a violation of Dills Act section 3519(b) when the alleged (b) violation is alone before the Board. CSEA urges the Board to adopt either a per se rule or find that a violation of section 3519(b) derives from a finding of a prima facie case of discrimination in violation of Dills Act section 3519(a). In the absence of a change in the current standard, CSEA asserts that it has sufficiently demonstrated an actual impact on its rights as an employee organization, establishing a violation of Dills Act section 3519(b).

DISCUSSION

Among the express purposes of the Dills Act is to provide "a reasonable method of resolving disputes" between the State employer and employee organizations.[4]

[4]Dills Act section 3512.

Dills Act section 3514.5(a)[5] describes PERB's jurisdiction in dispute resolution, and states, in pertinent part, that:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not . . . issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

There are several related public policy considerations which form the underpinnings of the limitation on PERB's dispute resolution jurisdiction described in this Dills Act section. First, the parties have the right to one neutral, administrative forum for the resolution of their disputes. Second, the parties have the right to choose a grievance and arbitration process, rather than PERB, as that neutral, administrative forum, and the Board should defer to the parties' choice. Third, by deferring to the parties' choice of an alternative forum, overlapping and duplicative proceedings are avoided, leading to the more timely resolution of disputes, and thereby contributing to stability and improvement in employer-employee relations.

With these policy considerations in mind, we now review previous Board decisions which considered PERB's dispute resolution jurisdiction.

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[5]Section 3541.5(a) of the Educational Employment Relations Act (EERA) contains the identical language. EERA is codified at Government Code section 3540 et seq.

In John Swett Unified School District (1981) PERB Decision No. 188 (John Swett), the Board first considered the scope of its jurisdiction in a dispute where a party alleged multiple legal theories based on the same conduct. In John Swett, the association filed a charge alleging discrimination against a union activist for exercising protected rights and interference with the association's organizational rights. The Board concluded that the dispute was not subject to deferral because part of the charge, the association's interference allegation, was not covered by the CBA. The Board, cognizant of the need to encourage the economic and efficient resolution of disputes, declined to divide the dispute and stated:

> We are unwilling to demand that the Association forfeit its statutory protections. Alternatively, we are unwilling to force the charging party to bifurcate the alleged violations and to engage in duplicative and overlapping proceedings through both the arbitration and unfair practice routes.

Following the John Swett decision, the Board developed a practice of refusing to defer portions of charges to arbitration. If an entire charge could not be deferred, then none of it was deferred. But this practice was significantly altered in Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore).

In Lake Elsinore the Board focused on the need to defer to the dispute resolution process agreed to by the parties. The Board held that EERA section 3541.5(a) established a nondiscretionary jurisdictional limitation on the Board's

authority to issue a complaint. Consequently, the Board ruled that PERB must dismiss and defer an unfair practice charge if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties.

The first cases in which the Lake Elsinore jurisdictional rule was applied involved a single cause of action, alleged unilateral changes made in violation of specific contract prohibitions.[6] These cases resulted in deferral to arbitration of a single legal theory, the failure to bargain in good faith.

In State of California (Department of Forestry and Fire Protection) (1989) PERB Decision Nos. 734-S and 734a-S (Department of Forestry), the Board for the first time since Lake Elsinore was confronted with a deferral question involving multiple legal theories. The Lake Elsinore jurisdictional rule precluded the Board from applying the approach developed from John Swett which allowed the Board to refuse to defer unless the entire charge could be deferred. The Board resolved this dilemma by deferring a portion of the charge and issuing a complaint on the remainder.

In Department of Forestry, the Board agent dismissed and deferred the unfair practice charge which asserted multiple legal theories. The charging party alleged that the employer's conduct

[6]Such as that in Lake Elsinore itself and in Eureka City School District (1988) PERB Decision No. 702.

interfered with both the rights of individual employees and, separately, the rights of the exclusive representative in violation of Dills Act section 3519(a) and (b). On appeal, the Board upheld the deferral of the alleged violation of section 3519(a) but reversed as to the alleged violation of section 3519(b). The Board concluded that since there was no provision in the parties' agreement that covered the rights of the employee organization, the alleged violation of section 3519(b) was not deferrable. Thus, the Board in Department of Forestry established a standard under which a dispute could be divided for consideration in two neutral administrative forums, PERB and an arbitration process, depending on the legal theory on which the allegation was based.

The Board reached the same result in State of California (Department of Parks and Recreation) (1990) PERB Decision Nos. 810-S and 810a-S (Parks and Recreation). where an employee was allegedly denied representation during an investigatory interview in violation of Dills Act section 3519(a) and (b). In Parks and Recreation, the Board majority stated the rule as follows:

> [W]here conduct allegedly violates both employee and employee organization rights, and the parties' collective bargaining agreement only prohibits the violation of employee rights, only the employee charge should be deferred.

The dissent in Parks and Recreation, supra, PERB Decision No. 810a-S, pointed out that under section 3514.5(a)(2) of the Dills Act, the Board is precluded from issuing "a complaint

against conduct also prohibited by the provisions of the agreement." The conduct at issue in the case was the denial of representation at an investigatory interview. Since this conduct was arguably prohibited by the agreement between the parties, the dissent concluded that the entire charge must be deferred regardless of the multiple legal theories on which violations were alleged at PERB. By issuing a complaint "against conduct prohibited by the collective bargaining agreement," the dissent asserted that the Board acted contrary to the mandatory language of section 3514.5(a)(2).

The dissent raised the same argument in State of California (Department of Corrections) (1992) PERB Order No. Ad-231-S (Department of Corrections). Referring to the jurisdictional rule set out in Lake Elsinore, the dissent stated:

> Based on the statutory language, the Board found that if the conduct is arguably prohibited by the CBA and the grievance procedure culminates in binding arbitration, then PERB has no jurisdiction over the unfair practice charge.
> (Emphasis in original.)

The conduct at issue in Department of Corrections was the termination of a correctional officer which resulted in the allegation of discrimination and interference violations of Dills Act section 3519(a) and (b). Because the conduct was arguably prohibited by the parties' agreement, the dissent argued that the Board was without jurisdiction and the entire charge must be dismissed and deferred.

The Board today concludes that the jurisdictional limitation of Dills Act section 3514.5(a) precludes the issuance of a complaint "against conduct also prohibited by the provisions of the agreement between the parties," if the grievance and arbitration procedure agreed to by the parties is applicable to that conduct and ends in binding arbitration. The language of the statute does not permit a determination of PERB jurisdiction based on the sections of the statute alleged to have been violated. It requires that the determination of PERB jurisdiction be based on the conduct which is the basis of the dispute. The Board, therefore, overrules Department of Forestry and its progeny to the extent that they have established a bifurcated deferral standard. The statutory limitation on PERB's dispute resolution jurisdiction requires the Board to defer to the parties' contractual grievance and arbitration procedure all alleged violations which are based on conduct prohibited by the parties' CBA, if the grievance and arbitration procedure is applicable to that conduct and ends in binding arbitration.

This rule is fully consistent with the public policy considerations noted above, on which the limitation on PERB's dispute resolution jurisdiction is based. It ensures that only one neutral, administrative forum will be responsible for resolution of any specific dispute. By this rule, PERB defers to the alternative dispute resolution forum the parties have chosen. Finally, this rule will eliminate overlapping and duplicative

proceedings,[7] lead to more timely resolution of disputes and contribute to employer-employee relations stability.

While eliminating the potential for duplicative proceedings about the same factual allegations, it is important to note that the rule adopted here is consistent with the fundamental principle that the jurisdiction to resolve a dispute must carry with it the authority to order an appropriate remedy for unlawful conduct. Where conduct is determined to violate both employee rights and union rights, the appropriate remedy is to correct or undo the conduct. For example, the appropriate remedy for a retaliatory dismissal is the reinstatement of the aggrieved employee. Similarly, the appropriate remedy for violation of union rights resulting from a retaliatory dismissal is the reinstatement of the aggrieved employee. Both an arbitrator and PERB can order this remedy. Therefore, a charging party's ability to secure an appropriate remedy for unlawful employer conduct is ensured by the jurisdictional rule adopted above.

In the present case, CSEA alleged that the State violated the Dills Act when it revised and downgraded Hsia-Coron's evaluation. This conduct is arguably prohibited by Article 5, section 5.5, and/or Article 2, section 2.8 of the parties' CBA, which prohibit the State from imposing reprisals on employees and union stewards for exercising rights under the Dills Act or the

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[7]The bifurcated deferral standard has resulted in duplicative proceedings before PERB, as in the case at bar, to gather evidence concerning conduct which forms the basis of a dispute which is properly before an alternative forum.

contract. Additionally, Article 6 permits CSEA to file grievances and provides for binding arbitration of those grievances.

The Board concludes that the conduct in dispute in this case is arguably prohibited by the provisions of the agreement between CSEA and the State, and the grievance procedure is applicable to that conduct and ends in binding arbitration. Accordingly, under the jurisdictional rule established in Lake Elsinore and discussed above, the Board determines that it is without jurisdiction over this matter, and CSEA's unfair practice charge must be dismissed and deferred to the parties' grievance and arbitration procedure.

ORDER

The complaint and unfair practice charge in Case No. SF-CE-105-S are hereby DISMISSED.[8]

Member Caffrey joined in this Decision.

Member Garcia's concurrence and dissent begins on page 17.

Member Carlyle's dissent begins on page 23.

[8]Contrary to Member Carlyle's opinion, the majority opinion does not affect the parties' right to negotiate contractual waivers. Furthermore, EERA section 3541(c), applicable to Dills Act cases through section 3513(h), states that "[n]othing shall preclude any board member from participating in any case pending before the board." Derived from this section is the long-standing policy and practice for the lead panel member to circulate a draft opinion among all Board members to give them an opportunity to review the proposed opinion. Chair Blair elected to join this case on December 16, 1993, one day after the first draft of the opinion attached to Member Carlyle's dissent was. made available to the entire Board. Member Garcia elected to join this case on March 28, 1995.

GARCIA, Member, concurring and dissenting: I concur in the deferral result and dissent from the attempt to change policy. Judicial policy in California directs courts to refrain from considering disputes until the parties to the dispute have exhausted internal remedies under the terms of their grievance agreement. For example, in Cone v. Union Oil Co. (1954) 129 Cal.App.2d 558 [277 P.2d 464] the Court of Appeal held that:

> It is the general rule that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust these internal remedies before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies. [Citations.] . . . Such procedures, which have been worked out and adopted by the parties themselves, must be pursued to their conclusion before judicial action may be instituted unless circumstances exist which would excuse the failure to follow through with the contract remedies. [Citations.] [Id. at pp. 563-564.]

That policy has been codified by section 3514.5(a) of the Ralph C. Dills Act (Dills Act).[1]

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[1]Section 3514.5(a) provides, in pertinent part, that:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not . . . (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary.

The preamble to the collective bargaining agreement (contract or agreement) in this case provides that a major purpose of the agreement is to establish a procedure for the resolution of disputes. For example, Articles 6.1(a) and 6.2(a) of the agreement[2] make it clear that the California State Employees' Association, SEIU Local 1000, AFL-CIO (CSEA) qualifies as a grievant entitled and obligated to employ the grievance process to resolve disputes between itself and the State of California (Department of Corrections) (Department or State) that are covered by the contract. Furthermore, it is probable that the subject matter of the dispute is covered by the contract and that is sufficient to send it to arbitration under Inglewood Unified School District (1990) PERB Decision No. 821 (Inglewood)[3]

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[2]Article 6.1(a) provides that:

> This grievance procedure shall be used to process and resolve grievances arising under this Contract and employment-related complaints.

Article 6.2(a) provides that:

> A grievance is a dispute of one or more employees, or a dispute between the State and the Union, involving the interpretation, application, or enforcement of the terms of this contract.

[3]In Inglewood, the Public Employment Relations Board (PERB or Board) expressly adopted the federal "not susceptible" standard to determine arbitrability:

> We cannot conclude that Article XX section 20.1 is not susceptible to an interpretation that would allow an arbitrator to resolve this dispute. We find that the District's contracting out . . . is arguably prohibited by the language in Article XX section 20.1 of

and Riverside Community College District (1992) PERB Order No. Ad-229 (Riverside).[4]

The grievance agreement between CSEA and the State permits a dissatisfied grievant to pursue a case through three appeals, and if there is no settlement then a right arises that permits CSEA to go to arbitration. This right is an option that permits CSEA access to a forum other than PERB. There is no mandate in the Dills Act that CSEA employ the option and surrender its statutory right of access to PERB. In fact it is clear from the legislative history of the Dills Act that mandatory arbitration was not to be imposed by California's public sector labor relations laws.

The Final Report of the Assembly Advisory Council on Public Employee Relations (1973), chaired by Benjamin Aaron (Aaron Report), discussed the background of California public sector labor relations legislation and made recommendations which were central to the development of the text of those statutes. From

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> the parties['] collective bargaining agreement. (Id. at p. 7.)

[4]In Riverside, the Board stated that:

> . . . arbitration should not be denied [1]unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.' [Riverside at p. 4, citing Inglewood.]

Under either phrasing of the standard, the contractual grievance agreement may be interpreted as covering the disputed conduct.

the Aaron Report it is clear that parties were to be encouraged to agree upon procedures to resolve their disputes:

> . . . the authority and duty to bargain collectively includes the power voluntarily to agree to third-party arbitration in accordance with standards mutually acceptable to the bargaining parties. Moreover, it is generally conceded that civil service regulations, even when conscientiously applied, are not an adequate substitute for a grievance and arbitration procedure hand-tailored by the parties to meet their particular needs. (Id. at p. 188.)

Similarly, at pages 224-225, the Report stated that:

> [T]he Advisory Council believes that the principle of voluntarism, not compulsion, should be the underlying policy in California at this stage of development of public-sector collective bargaining. Accordingly, we have rejected compulsory arbitration as the required statutory method for dealing with labor disputes. This does not mean that we believe that public employers and employee organizations should be foreclosed from agreeing to such arrangements. The principle of voluntarism means that they should be free to agree to any form of imposed settlement which they find mutually acceptable. . . .
>
> [T]he Advisory Council believes that voluntary arbitration, that is, the submission of a dispute to arbitration by choice, is the best means of resolving interests disputes that cannot be settled through mediation.

Furthermore, the statute was not intended to make mandatory arbitration a requirement:

> The Advisory Council is opposed to compulsory arbitration, standing alone, as a vehicle for disputes settlement . . . [because] compulsory arbitration may have a chilling effect on the bargaining process, that is, it may inhibit the parties from making their best efforts to reach a voluntary settlement because they know that, absent settlement,

> arbitration stands at the end of the line and they are deterred from compromise by fear of prejudicing their positions in the arbitration proceedings. (Id. at pp. 221-222.)

Therefore, it is a mistake for the majority opinion to attempt to adopt a mandatory arbitration policy through this opinion and in the process weaken the statutory rights of employee organizations and overturn sound PERB precedent established in State of California (Department of Forestry and Fire Protection) (1989) PERB Decision Nos. 734-S and 734a-S and its progeny.

It is clear from the facts of this case that the parties, consistent with State policy, intended the dispute at hand to be resolved through a grievance agreement. Under Dills Act section 3514.5(a)(2), PERB must defer this case until the grievance process is exhausted by the parties' effort to achieve a settlement. CSEA should have employed the pre-arbitration provisions of the grievance agreement and PERB agents should have held the case in abeyance until that part of the grievance process was exhausted without settlement. After exhaustion, the case could be re-activated if CSEA decided to pursue its statutory right to come to PERB rather than its option to go to arbitration.

Finally, in response to footnote 8 in the majority opinion, I am not permitted to join a case late in the process if my view would affect the outcome. My purpose in joining was to speak up against the attempt to change policy and point out that we are

obligated to review the terms and conditions of the parties' grievance agreement. We must apply it in a manner that is consistent with the parties' intent and California judicial policy which favors private resolution of disputes.

CARLYLE, Member, dissenting: I dissent from the new paneled majority decision based on "conduct," both as defined and enacted.

The majority decision proffered today admits overruling established case law by the Public Employment Relations Board (PERB or Board) relative to alleged violations of section 3519(a), (b), (c) and (d) of the Ralph C. Dills Act (Dills Act). It accomplishes this highly questionable result by narrowly redefining "conduct" arguably prohibited by the subject collective bargaining agreement (CBA) without regard to whether or not the offended party is covered as a subject by the CBA provisions or has standing to file the grievance in its own name.

The line of case law thrown out today by the new paneled majority recognized that the employee organization had a statutory right to file a charge with PERB under its own name if Dills Act section 3519(b) rights had been violated unless the subject CBA provisions "arguably prohibited" that conduct against that employee organization. Now, that statutory right is no more.

Perhaps even more odious by the new paneled majority is their reliance on the dissenting opinion in State of California (Department of Parks and Recreation) (1990) PERB Decision No. 810a-S and State of California (Department of Corrections) (1992) PERB Order No. Ad-231-S. What the majority decision does

not indicate to the reader is that both dissenting opinions were authored by the same person, former nine year Board Chairperson and Member Debbie Hesse.

What the majority decision also does not indicate to the reader is that as a result of their actions in creating a four member panel four months after oral argument and just two weeks before Member Hesse's term was to expire, this former nine year Board Chairperson and Member was disenfranchised from having her last authored opinion issued and distributed.

Attached to this "preamble" dissent is that signed opinion which constitutes the merits of my view. Authored by Member Hesse, it arrives at a result in favor of the California State Employees Association, SEIU Local 1000, AFL-CIO (CSEA) and against the State of California (Department of Corrections) (Department or State), a far cry from the majority decision issued today.

In addition to overruling established PERB case law relative to alleged violations of section 3519(a), (b), (c) and (d) of the Dills Act, I would note that the majority decision destroys the PERB line of cases dealing with waiver. The Board has held that the language of the subject CBA must constitute a "clear and unequivocal" waiver if the union's statutory right to file a 3519(b) charge is going to be taken away from it. (See San Mateo City School District (1980) PERB Decision No. 129.)

On a corollary issue, a waiver of a statutory right will not be found unless proven by either "clear and unmistakable" language or "demonstrable behavior" amounting to a waiver of the right to meet and negotiate. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74; Solano County Community College District (1982) PERB Decision No. 219.) Certainly the statutory right of a union to have its complaint of an alleged 3519(b) violation by the State heard before PERB is no less important.

Waiver is an affirmative defense which the asserting party must clearly establish. Any doubt regarding the validity of this defense must be resolved against the asserting party. (Placentia Unified School District (1986) PERB Decision No. 595.)

Despite the convoluted logic and distorted definitions utilized by the majority decision, the plain truth is that the State in this case does not 'identify any contract provision which arguably prohibits it from denying CSEA's rights guaranteed by the Dills Act. Therefore, in accordance with established PERB case law in the area of waiver as well, this matter cannot be deferred to arbitration. (See Palo Verde Unified School District (1983) PERB Decision No. 321; Los Angeles Community College District (19 82) PERB Decision No. 252.).

The Board has no business awarding to one of the parties that which it cannot achieve at the bargaining table.

This new paneled majority decision should have been issued on March 15. To cite a former nine year PERB veteran's dissenting opinions as if to justify overturning established PERB case law while taking action which results in precluding that PERB veteran from issuing and distributing a decision which arrives at a completely different result must be the unkindest cut of all.[1]

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[1]The majority has previously alleged in writing and during the March 23, 1995 Board meeting (without any written support or documentation despite a written request for such authority) that PERB has a: " . . . long-standing Board policy that when authorship changes normally a new [Predeliberation Memo] is issued, unless all parties have in written form shared their analyses and legal research. That long-standing Board policy created a process which was designed to insure open sharing of opinions until the ultimate decision is reached."

The majority is now asserting a "long-standing practice" for the author to circulate a draft decision among all Board members to give them an opportunity to review the proposed Board decision, based upon "Government Code section 3541(c), applicable to Dills Act cases through section 3513." Once again, the majority's position is more fantasy than fact.

PERB has had a written policy for 12 years requiring the author of the case to prepare a predeliberation memo (which includes his/her written analysis of the facts, issues, law and position) and to circulate it to all Board members irrespective of original panel membership. This document precedes any first draft decision.

However, also contained in this 12-year written policy is a caveat, if not admonishment to Board members not originally assigned to a case panel from taking any action which would give the appearance that such action was taken "for the purpose of controlling the outcome of the case." Notice the word: Outcome.

The outcome (who wins, who loses) of this disputed case was known to all Board members on October 14, 1993. On that day, the original author, Member Caffrey, turned over authorship of the case to Member Hesse based on the responses to his first draft from both Members Hesse and Carlyle. All Board members received a copy of Members Hesse's and Carlyle's aforementioned responses and of Member Caffrey's memo turning over authorship. Joining on or before October 14, 1993 would have been permissible. The issue is not whether one can join at all, but when and its effect.

ATTACHMENT

STATE OF CALIFORNIA
DECISION OF TEE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION, SEIU LOCAL 1000, AFL-CIO,	)	
Charging Party,	)	**Case** No. SF-CE-105-S
v.	)	PERB Decision No.
STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS),	)	
Respondent.	)	

Appearances: Melvin K. Dayley, Attorney, for the California State Employees' Association, SEIU Local 1000, AFL-CIO; Paul M. Starkey, Attorney, for the State of California (Department of Corrections).

Before Blair, Chair; Hesse, Caffrey and Carlyle, Members.

DECISION

HESSE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California State Employees' Association, SEIU Local 1000, AFL-CIO (CSEA) to the proposed decision of a PERB administrative law judge (ALJ). In his proposed decision, the ALJ dismissed the charge that the State of California (Department of Corrections) (State) violated section 3519(b) of the Ralph C. Dills Act (Dills Act)[1] through the negative revision and communication of an employee's evaluation.

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519 states, in pertinent part:

> It shall be unlawful for the state to do any of the following:
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

The Board has reviewed the entire record in this case, including the proposed decision, transcripts, exhibits, exceptions, cross-exceptions and responses thereto. Based upon our review, we hereby affirm in part and reverse in part the ALJ's decision for the reasons set forth below.

PROCEDURAL HISTORY

On December 26, 1991, CSEA filed an unfair practice charge against the State. The PERB general counsel issued a complaint against the State on April 22, 1992. On the same date that he issued the complaint, the general counsel also denied motions by the State to dismiss the charge as untimely filed and to defer the charge to arbitration.[2] Hearings were conducted in San Francisco on July 9 and 10, 1992. After the proposed decision was issued, CSEA filed a statement of exceptions which included a request for oral argument. The Board granted this request and oral argument was scheduled and held on August 18, 1993.[3]

FACTS

We find the ALJ's findings of fact to be free from prejudicial error and, to the extent that they are consistent with the following summary and discussion, we adopt them as our

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[2]CSEA, by letter dated March 31, 1992, withdrew all allegations except for the charge that the State, by issuing the revised evaluation, violated section 3519(b).

[3]In granting oral argument, the Board gave each party the opportunity to file an oral argument brief net later than seven days prior to the date set for oral argument. CSEA timely filed its brief on August 8, 1993 by certified mail. The State did not file its brief until August 16, 1993. As such, the Board rejects the State's brief as untimely pursuant to PERB Regulation 32136 (Cal. Code Regs., tit.8, sec. 31001 et seq.).

own. As the facts are largely undisputed, the following is summarized from the ALJ's proposed decision, with some additional information drawn from the record and added for clarification.

The respondent is an employer under the Dills Act. At all times relevant, CSEA has been the exclusive representative of State employee bargaining Unit 3 among whose members are teachers and librarians employed in correctional institutions. The complainant, Andy Hsia-Coron (Hsia-Coron), at all times relevant was employed as a teacher at the Correctional Training Facility at Soledad (CTF). CTF is divided into three units, north, south and central. Throughout the relevant period and continuing, Hsia-Coron has been employed in the north facility.

Hsia-Coron has been a job steward for CSEA for seven years. In 1990, he ran for and was elected to the CSEA Bargaining Unit Council for Unit 3. In this role, he has served on the CSEA negotiating team throughout the protracted negotiations which began in May of 1991 for a new Unit 3 contract between the State and CSEA. The parties stipulated that CTF Warden Eddie Meyers (Meyers), Associate Warden Jan Blake (Blake) and Howard Howser (Howser), Hsia-Coron's former supervisor,[4] all knew of these protected activities.

Hsia-Coron testified that he told Howser of his intention to run for the bargaining unit council prior to doing it. He said Howser recommended that he not run because it would not be in his

[4]Howser was supervisor of academic instruction at the CTF north facility until he retired subsequent to the events at issue.

best interest. Howser denied that he said this but testified that he did not want Hsia-Coron to leave the classroom because he was a good teacher, substitutes were hard to get and he needed him in the classroom. The ALJ resolved this dispute by concluding that Howser made some comment to Hsia-Coron indicating that he did not favor any activity that would take Hsia-Coron away from the classroom.

On October 4, 1990, the State issued a notice of adverse action to Hsia-Coron. The adverse action was an official letter of reprimand for inexcusable neglect of duty, insubordination, inexcusable absence without leave, willful disobedience, violation of board rule, and other failure of good behavior. The factual basis for the reprimand was Hsia-Coron's alleged absence without leave on July 25, 26, 27 and 28, 1990 and alleged failure to follow the direct order of his supervisor who informed him that he was to report for duty on those dates.

CSEA challenged the disciplinary action both by filing a grievance and by contesting the reprimand before the State Personnel Board (SPB). CSEA argued that the purpose of the absence was for Hsia-Coron to conduct certain CSEA business. CSEA took the position that Hsia-Coron's supervisor did not deny the requested absence but told him only that it would not be approved in the absence of paperwork. CSEA asserted that the written denial of the absence was received. on Hsia-Coron's day off and since no one called to tell him, he was unaware that the union leave had been rejected.

The SPB hearing relating to the letter of reprimand was conducted on February 25, 1991. After some evidence was taken, the parties at the encouragement of the SPB administrative law judge entered a stipulated settlement. Under the settlement, the official letter of reprimand and all related documents were to be removed from Hsia-Coron's personnel file effective July 1, 1991. Hsia-Coron was to submit a letter dated February 25, 1991, to the warden regarding union paid leave. This letter also was to be removed effective July 1, 1991. Hsia-Coron was to withdraw his appeal of the disciplinary action. The agreement was subject to approval by the SPB. The SPB approved the stipulated settlement at its meeting of March 19, 1991.

On June 6, 1991, Hsia-Coron received a performance evaluation for the period from April 1990 through April 1991. In seven rating categories, his performance was graded as "M" which means that his performance fully met the expected standards. One category, "Meeting Work Commitments," was marked "I" which means that improvement was needed for performance to meet expected standards. The explanation for the mark of improvement needed was "failed to attend mandatory [in-service training] class on AIDS during months of July and August 1990." Hsia-Coron discussed the evaluation with his supervisor, Howser, and signed it as did Howser.

Howser turned the evaluation over to Juanita Curtis who was the acting supervisor of correctional educational programs. She signed it and sent it on to Blake the acting chief deputy warden

for CTF north and south. Blake rejected the evaluation because, she testified, it did not reflect the employee's behavior during the rating period. She sent the evaluation back to Howser with a note that he should see her for a discussion as soon as possible.

At their subsequent meeting, Blake told Howser that Hsia-Coron had shown poor judgment in his absence from work and his behavior should be addressed in the evaluation. Howser testified that it was his previous belief that "once [an] adverse action and the investigative interview had been performed, then I wasn't to mention that" in an evaluation. He testified that he had believed that it was against the rules to "take anything out of the investigative interview" and put it in an evaluation. However, he said, he was informed that he was mistaken in this belief and he agreed to change the evaluation. Blake did not tell Howser what to write in a revised evaluation except that Hsia-Coron's "behavior" had to be referenced. Howser testified he was told to revise the evaluation "immediately, as soon as possible."

Howser wrote a revised evaluation on June 25 in which he marked Hsia-Coron's performance as "improvement needed" in four categories. The three new categories needing improvement were "work habits," "relationships with people," and "analyzing situations and materials." Comments in each of the changed areas referred to Hsia-Coron's failure to report to work on July 25, 26, 27 and 28, 1990. Added to the evaluation was a lengthy narrative comment about Hsia-Coron's work performance. Much of

this commentary also referred to Hsia-Coron's "failure to report to work and your subsequent absence from your work assignment without leave from July 25 through July 28, 1990."

The revised 1991 evaluation was a marked contrast with other evaluations Hsia-Coron had received from Howser. On his 1987 evaluation he received three marks of meets expectations, three of consistently exceeds expected standards and one of needs improvement (for failure to satisfy in-service training requirements). In 1988, he received no marks for improvement needed or highly favorable narrative comments on the evaluation. In 1989, he received five marks for meeting expected standards, three marks for exceeding expected standards and no marks for improvement needed. The narrative was highly favorable. In 1990, he received six marks for meeting expected standards, one mark for improvement needed (again for failing to meet in-service training requirements) and none for exceeding standards. The narrative noted that he had been away from the institution on loan to the central office for approximately eight months.

All CSEA witnesses testified that they had never heard of an evaluation being changed on the order of a higher administrator after both the employee and immediate supervisor had signed it. One of the witnesses, Harvey Martinez (Martinez), had been in State service for 20 years. Other witnesses had been State employees for lesser periods but had served as stewards at one time or another and had processed grievances.

Acting Chief Deputy Warden Blake testified that beginning with the arrival of Warden Meyers in 1987, it became institutional policy that the warden or designee would review all evaluations. At first, only the evaluations of correctional officers were reviewed by the warden. But beginning in 1990, the warden reviewed the evaluations of all teachers. Under Warden Meyers, she testified, an evaluation is not final until it is signed by the warden or designee. Hsia-Coron's 1990 evaluation was initialed by both Blake and Warden Meyers.

Although a practice of review of evaluations by prison administrators was thus established, there was no evidence that this review previously amounted to more than an examination for minor errors. The only testimony on the nature of the administrative review was that of Howser. He said that beginning in 1991, evaluations had to be "perfect" or they would be sent back because of mistakes, omissions, misspellings and grammatical errors. There was no evidence that any evaluation, prior to that of Hsia-Coron, had ever been so drastically downgraded on the order of high-ranking prison authorities.

After he changed the evaluation, Howser concluded that he should call Hsia-Coron and inform him of the change. He knew that Hsia-Coron was in Sacramento for negotiations and he concluded that State negotiator Rich Hawkins (Hawkins) would know how to reach him. He called Hawkins' office and was given a telephone number where he could reach Hawkins. Howser called the number and Hawkins answered.

The telephone number which Howser dialed was for a conference room at the Raddison Hotel in Sacramento. When the telephone rang, the parties were then in negotiations. Hawkins, a member of the management team, was sitting closest to the telephone. He called Hsia-Coron to the telephone, advising him that his supervisor wanted to talk to him.

Hsia-Coron and Howser provided highly similar accounts of the subsequent conversation. Both agree that Howser commenced the conversation by advising Hsia-Coron that he had "some bad news" for him. Howser testified that he asked Hsia-Coron if he wanted to discuss it then or later. Hsia-Coron testified he told Howser he wanted him to be specific. Howser thereupon told Hsia-Coron that he had been directed to change his evaluation and that the new evaluation now rated Hsia-Coron as "improvement needed" in four areas rather than one. Howser explained the basis for the change. Hsia-Coron said he disagreed. Following a brief discussion about how Hsia-Coron would get a copy of the revised evaluation, the conversation was terminated.

After hanging up the telephone receiver, Hsia-Coron turned to the two negotiating teams and blurted out that his supervisor had just told him his evaluation had been changed. He quoted Howser as saying the change had been ordered by higher authorities. At that point, the CSEA negotiating team asked to take a caucus break and left the room.

During the caucus, Hsia-Coron reviewed the entire telephone conversation and explained his view of the underlying dispute

about his absence from work and subsequent letter of reprimand. Caucus members then discussed whether they should take a position about the evaluation in negotiations, deciding ultimately that they should not. When the CSEA negotiating team returned to the negotiations table, State negotiator Dennis Fujii (Fuji) asked, "where are we?" One of the CSEA negotiators replied that they would address the evaluation issue in another forum and suggested the parties resume negotiations.

Various members of the CSEA negotiating team described the impact on them regarding the change made to Hsia-Coron's evaluation and the telephone call to the negotiating room. Hsia-Coron said he was shocked, surprised and hurt. He said that after receiving the telephone call he tried to keep himself together and "put a face on" but he was stewing over the issue. Two CSEA negotiators described Hsia-Coron as looking like "he had been punched" and another described him as "rather subdued."

CSEA negotiator Mary Shaw (Shaw) testified that after the telephone call she found it very difficult to concentrate on bargaining. She described team members as very focused on Hsia-Coron's evaluation. She said she kept "flashing" back to the telephone call. She said she wondered, regarding the evaluation, "how can they change it and put 'improvement needed?'"

CSEA negotiator and Bargaining Unit 3 Chair John Paul said he was concerned about why the supervisor would call the negotiating room. He said this put an "outside influence" at the

negotiating table and "I immediately had a concern for my own evaluation report." He said he wondered, "what will happen to the rest of us?" He described the changed evaluation as a statement that they are the boss and we are the workers and said he had a feeling it could happen to him.

CSEA negotiator Martinez described the changed evaluation and telephone call as "absolutely appalling and very distracting." He said it made him angry and upset. He said the incident was very distracting from bargaining and felt like it was intended to intimidate the union team. CSEA negotiator Gary Kane said team members decided they would try not to show their agitation over the incident. However, he said, "[I]t got me to thinking, if it can happen to Andy, it can happen to me." He said he was pre-occupied with the incident in negotiations.

The issue of the changed evaluation did not end with the June 26 telephone call. It returned to the table again in subsequent months. All CSEA witnesses testified that when the telephone would ring during negotiating sessions, a member of the State bargaining team would sometimes refer to the incident. Cue witness said a ringing telephone might be announced by a member of the State team with the comment "it's your supervisor, Andy." CSEA witnesses also testified that State negotiators made other occasional references to Hsia-Coron's evaluation. CSEA witnesses estimated that five or ten such references were made at subsequent negotiating sessions. They agreed that the comments were made in a joking manner but shared the view that they were

barbed and had a negative effect. Shaw described the references to the telephone call as "subtle" intimidation.

CSEA negotiators acknowledged that they never told members of the State team to stop the comments. State negotiator Fujii also testified that Hsia-Coron had joined in making the joking comments about his evaluation. Hsia-Coron admitted that he had made several such references, but said it was only in very recent meetings and that his intent was to show that he could take a ribbing.

THE PROPOSED DECISION

Deferral

The ALJ first determined that the allegation of the State denying CSEA protected organizational rights in violation of section 3519(b) should not be deferred to arbitration. Under Lake Elsinore School District (1987) PERB Decision No. 646[5] an unfair labor practice will be dismissed and deferred to arbitration if: (l) the grievance machinery of the contract covers the matter at issue and culminates in binding arbitration and (2) the conduct complained of is prohibited by the provisions of the agreement between the parties.

[5]In Lake Elsinore School District, the. Board found that section 3541.5(a) of the Educational Employment Relations Act established a jurisdictional rule. As this section is in relevant part identical to Dills Act section 3514.5 the Board has applied the same jurisdictional rule.

In its argument before the ALJ, the State cited four sections[6] of the contract as covering the matter at issue and which culminates in binding arbitration. The ALJ, relying on a previous denial of a motion to defer by the Board's general counsel on April 22, 1992 determined that no cited provision of the contract prohibited the State from denying employee organizations their rights under the Dills Act.

Denial of Organizational Rights

Employee organizations under the Dills Act are granted certain rights that exist apart from the protected rights of

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[6]The cited contract provisions are:

> (1) Section 2.1(a) under which "The State recognizes and agrees to deal with designated Union stewards, elected bargaining unit council representatives or Union staff" for a variety of listed activities;
>
> (2) Section 2.8 in which "The State is prohibited from imposing or threatening to impose reprisals, from discriminating or threatening to discriminate against Union stewards, or otherwise interfering with, restraining, or coercing Union stewards because of the exercise of any rights given by this contract;"
>
> (3) Section 13.2 which sets out procedures for performance appraisals and provides that Unit 3 civil service employees who receive substandard ratings in a majority of the performance factors may grieve the content of the appraisal through the fourth step, which precedes binding arbitration; and
>
> (4) Section 21.2 which sets out standards for material to be kept in employee personnel files, provides for employee access to those files and affords employees certain rights to place information in the personnel file.

individual employees. Under Dills Act section 3515.5,[7] employee organizations have the right to represent their members in their employment relations with the state. CSEA argued that by revising negatively, the performance appraisal of Hsia-Coron, the State denied CSEA the right to represent its members. Further, CSEA argued that as unit members are front line negotiators, it suffers as an organization whenever a negotiator is subject to retaliation.

In response, the State argued that CSEA had failed to establish any evidence of improper motivation or denial of CSEA's rights. Further, the State contends that its review of Hsia-Coron's evaluation by prison administrators was consistent with established policy and fully appropriate. Moreover, the State argues that there was no evidence that the negative evaluation resulted in any actual interference with CSEA's ability to represent its members.

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[7]Section 3515.5 states:

> Employee organizations shall have the right to represent their members in their employment relations with the state, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized employee organization is the only organization that may represent that unit in employment relations with the state. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the state.

To establish a 3519(b) violation on this theory, the ALJ found that CSEA must prove two points. First, CSEA must show the State discriminated against Hsia-Coron for participation in protected activity. Secondly, after proving discrimination, CSEA must then prove that the effect of the discrimination was to deny it the right to represent its members.

To prove discrimination, CSEA is required to demonstrate that: 1) the employee engaged in protected conduct; 2) the employer knew of the employee's protected activity; 3) the employer took adverse action against the employee; and 4) the employer's action was motivated by the employee's participation in protected activity. (Novato Unified School District (1982) PERB Decision No. 210 (Novato).)

The ALJ found that Hsia-Coron was engaged in protected activity. Further, the ALJ determined that it was clear that the State took negative action against Hsia-Coron when it down-graded his performance evaluation which was a serious act that had implications for his future job security. Finally, the ALJ concluded that substantial evidence existed demonstrating unlawful motivation in the revised evaluation. CSEA witnesses, including several stewards, testified that they had never heard of downgrading an evaluation after it was signed by an employee's immediate supervisor. The downgrading was based entirely on a reprimand Hsia-Coron had been given for unauthorized absences to engage in CSEA activity. As the State did not provide sufficient evidence to rebut the discrimination allegation, the ALJ

concluded the evidence supported a finding of a prima facie case of discrimination.

However, the ALJ determined that CSEA failed to meet the second requirement to establish a violation of Dills Act section 3519(b) that in discriminating against Hsia-Coron, it denied CSEA the right to represent its members. Although the ALJ found evidence that members of the bargaining unit were disturbed by the revised evaluation, he held that in accordance with Palos Verdes Unified School District (1988) PERB Decision No. 688 (Palos Verdes) there was no actual impact on CSEA's ability to represent its members. No CSEA bargaining member left the team, nor was any evidence presented showing that CSEA's negotiating strategy was less effective in further bargaining negotiations, nor did it inhibit CSEA team members from speaking out in subsequent sessions. The ALJ concluded that where an alleged violation of section 3519(a) has been deferred to arbitration, CSEA, in order to prevail on a section 3519(b) theory, must show actual impact. As CSEA had supposedly failed in meeting its burden, the section 3519(b) charge was dismissed.

CSEA'S EXCEPTIONS

On appeal, CSEA argues that the ALJ was incorrect in concluding that CSEA experienced no detrimental impact. CSEA argues that substantial evidence was introduced showing that negotiations were delayed and became more difficult. CSEA also asserts that this led them to being less effective in its negotiations. Further, CSEA argues that this is an appropriate

case for the adoption of a per se rule governing employer interference with employee bargaining rights. Further, **CSEA contends** that no proof of actual **impact should be required as if such, CSEA** would be subject **to revealing internal weaknesses which would strengthen** the **employer's negotiating power.**

STATE'S RESPONSE AND CROSS-EXCEPTIONS

The State supports the ALJ's finding that there must be actual interference to support a violation of Dills Act section 3519(b). The State contends that CSEA failed to show any objective evidence that it interfered with CSEA's right to negotiate.

Additionally, the State argues that the ALJ erred in determining that it discriminated against Hsia-Coron. Although the ALJ correctly found the State's policy on reviewing evaluations was in place before the charge arose, the State asserts that the evidence failed to support a finding that the policy was limited to review for clerical errors.

Finally, the State contends that the charge should have been deferred to arbitration based upon section 23.8 of the parties' collective bargaining agreement (CBA) relating to union job steward protection which prohibits the State from retaliating against job stewards "because of the exercise of any rights given by this contract."

DISCUSSION

As a threshold matter, we must determine whether PERB has jurisdiction in the case at bar. The State argued that PERB does

not have jurisdiction over the case because the alleged section 3519(b) violation must be deferred to arbitration. The State contends that several sections of the CBA address the alleged conduct and require deferral, including section 2.8 of the CBA which prohibits the State from retaliating against union job stewards "because of the exercise of any rights given by this contract."

In Los Angeles Unified School District (1990) PERB Decision No. 860, the Board held that the exercise of PERB jurisdiction is not precluded unless the alleged unfair practice is arguably prohibited by the parties agreement. While section 2.8 of the CBA prohibits the State from denying the rights of union stewards, the State does not identify any contract provision which arguably prohibits it from denying CSEA's rights guaranteed by the Dills Act. As the Board observed in State of California (Department of Corrections) (1992) PERB Order No. Ad-231, it "cannot make arbitrable that which parties did not agree to arbitrate." The ALJ correctly considered all the contract provisions offered by the State and denied the motion to defer. We have reviewed the provisions and agree with the ALJ that the motion must be denied.

In reversing the ALJ, we hold that the State denied CSEA's rights that are guaranteed by the Dills Act through its discriminatory conduct against Hsia-Coron.

The ALJ found that in order to establish a Dills Act section 3519(b) violation on the State, CSEA had to prove that (1) the

State discriminated against Hsia-Coron for participation in protected activity. Proof of discrimination for this purpose was identical to what would have been required if the 3519(a) violation had not been deferred to arbitration; and (2) CSEA had to prove that the effect of discrimination was to deny CSEA the right to represent its members. We agree. However, the ALJ further found that CSEA had to show that it suffered actual adverse action as a result of the State's discriminatory actions. It is here where we part company with the ALJ's analysis.

CSEA urges a finding that the State violated Dills Act section 3519(b) by interfering with the protected union rights. It is asserted that the revised negative evaluation and telephone call to the employee at the bargaining table had a "chilling effect" on the other unit members.

In Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad), the Board set forth the test for determining when employer actions interfere with the rights cf employees guaranteed by the Act. Later, in Novato Unified School District. supra. the Board clarified Carlsbad by setting forth a test to be applied in cases of alleged discrimination or reprisal against employees for their participation in protected activities. In Coast Community College District (1982) PERB Decision No. 251, the Board distinguished between interference and discrimination cases. Under McPherson v. PERB/Carlsbad Unified School District (1987) 189 Cal.App.3d 293, [234 Cal.Rptr 428], reversing PERB Decision No. 529, the court recognized the distinction between

the retaliation and interference standards and admonished PERB for not analyzing a discrimination pleading under both legal standards.

A case of interference is established when the charging party shows that the employer's conduct tends to or does result in some harm to employee's rights. Where the harm to employee rights is slight and the employer offers justification based on operational necessity, the competing interests are balanced. Where the harm is inherently disruptive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and no alternative course of action was available. In interference cases, proof of unlawful intent is not required.

Applying the Carlsbad standard to this case, it is determined that CSEA has proven a case of interference. What union right is more fundamental than the right to represent its members through a collective bargaining process free from employer interference? The record is clear that the precipitating factor was that having agreed earlier, to remove a similar letter of reprimand from Hsia-Coron's personnel file, the State wanted to breathe new life into its rebuke of Hsia-Coron for his alleged absence without leave while he was on union business by creating a new negative evaluation. It is equally clear from the record that Hsia-Coron's union affiliation and activism was the State's motivating factor in the decision to send the message to the bargaining table. Indeed, the attorneys

for the State at oral argument acknowledged that an evaluation change of this nature required immediate communication to the affected employee. Further, they admitted that they knew where Hsia-Coron was and what he was there for when the telephone call was placed to him. During negotiations, a telephone call from the employer to an employee that the employee's performance appraisal had been revised in a negative manner is inherently disruptive to CSEA's rights. The State's business justification defense, that the communication at the negotiating table was time-sensitive, is hereby rejected. The negative change in the evaluation, the subsequent communication concerning the evaluation was a consequence of protected activity and therefore, the action was a violation of Dills Act section 3519(b).

Moreover, it is apparent that the State's conduct has the potential to "chill" the relationship between the parties in future negotiations. Hsia-Coron and other CSEA bargaining unit members will be wary of taking time off from their work to conduct CSEA business--to participate in negotiations knowing that a negative performance evaluation may be based in part on their absences due to their engagement in protected activities.

Therefore, we conclude that under the totality cf circumstances, the State's conduct was violative of CSEA's rights. To the extent that Palos Verde and its progeny can be read to have overruled Carlsbad or to require an employee organization to show actual harm in an interference claim, we overrule that decision. A showing of harm is not a requisite to

proving a case where the harm is inherently destructive as demonstrated in this case to important union rights.[8] (NLRB v. Great Dane Trailers, Inc. (1967) 388 U.S. 26 [65 **LRRM 2465].)** Therefore, the Board finds that the State violated section 3519(b) of the Dills Act.

ORDER

Based upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it has been found that the State of California (Department of Corrections) violated the Ralph *C.* Dills Act (Dills Act) section 3519(b).

Pursuant to Government Code section 3514.5(c), it is hereby ORDERED that the State of California (Department of Corrections) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Denying the California State Employees' Association, SEIU Local 1000, AFL-CIO rights guaranteed to it by the Dills Act.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT.

1. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily

[8]Reliance upon State of California (Franchise Tax Board) (1992) PERB Decision No. 954-S to support the position of the State is misplaced since the holding in that case requires the union "to establish a denial of [its] rights, separate and apart from the harm allegedly suffered by [an employee].[11] That is not the same, however, as requiring that the only way a union can establish a denial of its rights is by showing actual impact or harm to it.

placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

2. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Member Carlyle joined in this Decision.

Member Caffrey's dissent begins on page 24.

12/13/93
Deborah M. Hesse, Member

12/21/93
Huston T. Carlyle, Jr. Member]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF TEE
PUBLIC EMPLOYMENT RELATIONS BOARD
An agency of the State of California

After a hearing in Unfair Practice **Case No. SF-CE-105-S, California State Employees' Association. SEIU Local 1000, AFL-CIO** v. State of California (Department of Corrections), in which all parties had the right to participate, it has been found that the State of California (Department of Corrections) violated section 3519(b) of the Ralph C. Dills Act (Dills Act).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Denying the California State Employees' Association, SEIU Local 1000, AFL-CIO rights guaranteed to it by the Dills Act.

Dated: _____ STATE OF CALIFORNIA
(DEPARTMENT OF CORRECTIONS)

By: _____
Authorized Agent

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